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IN THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1965

No. 974

JAMES J. D'ELIA, JR., Petitioner

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD AND RICHARD JOYCE SMITH, WILLIAM J. KIRK, HARRY W. DORIGAN AS TRUSTEES OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

James J. D'Elia, appellant below, petitions for a writ of certiorari to review a decision of the United States Court of Appeals for the Second Circuit affirming the District Court's granting of a motion for summary judgment.

OPINIONS BELOW

The opinion of the Court below (Appendix A infra) is not yet officially reported. The opinion of the District Court (Appendix B infra) is reported in.

JURISDICTION

The opinion of the Court of Appeals was handed down on November 24, 1964. This Court has jurisdiction under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

A.

When the Plaintiff has alleged that the National Railroad Adjustment Board entered a finding supporting the action of the Defendant in suspending him from pay from January 8, 1960 - March 22, 1960 and the Plaintiff has requested the District Court to review the action of the Board, was it correct to grant a motion for summary judgment in favor of the Defendant?

B.

When the Plaintiff has alleged that the hearing before the National Railroad Adjustment Board and the finding thereafter was in derogation of his constitutional rights because the record before the Board was based upon a record made before a hearing officer designated by the railroad who had bias and prejudice toward the Plaintiff, was it correct to grant a motion for summary judgment in favor of the Defendant?

STATEMENT

This appeal involves a suit brought by the Plaintiff to have the adverse decision of the National Railroad Adjustment Board reviewed and reversed by the District Court or in the alternative to find that his Constitutional right of procedural due process was infringed and to require a new hearing be granted to him.

The complaint alleges the following:

The Plaintiff James J. D'Elia, Jr. was an employee of the New York, New Haven and Hartford Railroad. On January 8, 1960 the Plaintiff was accused of being absent from

his duties from 8:00 a.m. to 8:30 a.m. and of using abusive and vile language to General Foreman A. Crawford. He was also accused of shoving electrician H. Wrobel. D'Elia was relieved from duty. Thereafter D'Elia was notified to appear at a hearing which was held on January 20, 1960. The hearing officer was Master Mechanic J. J. Pfister. At the hearing Pfister refused to allow a Mr. Flanagan to represent D'Elia as requested by D'Elia. D'Elia claims that Pfister was biased and prejudiced as to him and that therefore the hearing was void.

On February 2, 1960 Mechanical Superintendent R. H. Davis advised the Plaintiff that he had been found guilty of all charges and he was being dismissed from the service of the Railroad. This decision was based upon a transcript of the hearing conducted by J. J. Pfister.

The decision of Davis was appealed to the Vice-President, Labor Relations and Personnel of the Railroad as provided by contract. As a consequence the Plaintiff was restored to service with seniority and vacation rights unimpaired but without pay for time held out of service.

This decision was then submitted to the National Railroad Adjustment Board, Second Division. Because its Union and Railroad members were unable to agree, an arbitrator was assigned. The arbitrator upheld the Raiload. He did so upon the record made by the hearing officer Pfister.

REASONS FOR GRANTING THE WRIT

1. A motion for Summary Judgment must be denied unless it is unequivocally established that there is no genuine issue of material fact.

In *Poller v. Columbia Broadcasting* 368 U.S. 464 (1961) the Court stated at 467:

> Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case "show that (except as to the amount of damages) there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56 (c), Fed. Rules Civ. Proc. This rule authorizes summary judgment as a matter of law, where it is quite clear where the truth is, . . . (and where) no genuine issue remains for trial . . . (for) the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." (case cited)

We really have issues to try in the case before the Court.

It is within the framework established by these cases that the issues presented in the instant case must be argued.

2. Based upon the issues framed by the complaint, there were genuine issues of fact before the District Court which precluded the granting of the Defendant's motion for Summary Judgment.

A. The District Court had the power to review the evidence before the National Railroad Adjustment Board and make a determination of its validity or lack thereof.

The applicable statute is 45 USCA Section 153 First (M) which states in part:

> * * * the awards (of the Board) shall be final upon both parties to the dispute, except insofar as they shall contain a money award.

The act then allows judicial review if there is a money award but none if there is not. Practically it means that if the employee wins the employer may have the finding reviewed,

if the employer prevails the employee may not have it reviewed. In spite of the decision of majority in *Union Pacific R. Co. v. Price*, 360 U.S. 601 (1959) we submit that this paradoxical situation has no place in our law. We ask this Court to consider the persuave reasoning of Mr. Justice Douglas speaking for the minority in *Union Pacific R. Co. v. Price, supra* in which he stated at page 618:

> * * * We refused to follow the discarded doctrine there; and it should find no place here. An award of no damages is, as I see it, as much a "money award" as an award of 6 cents. The words "money award" are descriptive of the nature of the claim, setting that class apart from other suits which involve, for example, a declaration of senority rights.
>
> Tolerance of judicial review has been more and more the rule against the claim of administrative finality, (cases cited) * * *
>
> Respondent argues that it would be grossly untair to construe Sec. 3 First, (m) so as to deny judicial review to a defeated employee but not to a defeated railroad. That would indeed be the result if an employee asserting a money claim cannot get Court review if he loses, while the employer can obtain it if the employee wins * * *

The Court minority continued at P. 620:

> * * * Since there is no provision in the Act that specifies what judicial review may be obtained, there are preserved whatever judicial remedies are available.

The minority then also continued at P. 621:

> In my view the Court's contrary reading of Sec. 3

> raises questions of constitutional magnitude. For if an employee is to be denied any review of the Board's decision when the railroad prevails, while the latter can obtain judicial review with a jury trial before complying with Board order, there would appear to be an unjustifiable discrimination in violation of the Due Process Clause of the Fifth Amendment. It is not the usual practice in this country to permit one party to a lawsuit two chances to prevail, while the other has only one, nor to permit one party but not the other to get a jury determination of his case.

We submit that the foregoing reasoning is highly persuasive and logical. It is our claim that to deny Mr. D'Elia a review of the doings of the National Railroad Adjustment Board is to unjustifiably discriminate against him in violation of the Due Process Clause of the Fifth Amendment.

We submit that either the District Court has the power to review the doings of the Board, or that the provision in 45 U.S.C.A. Supra applying to review is unconstitutional.

B. The Plaintiff was denied Procedural Due Process in his hearing before the National Railroad Adjustment Board.

In order for this issue to be properly discussed and for the purposes of clarification it is desirable to repeat the facts upon which this claim is based. Under the terms of the contract between the Defendant and the Brotherhood of Railway Carmen of America (of which the Plaintiff is a member) disciplinary action such as taken against the Plaintiff requires a hearing. The Defendant designates the hearing officer. It is from the transcript made before him that everything flows: The decision of the Mechanical Superintendent, the decision of the Vice-President, Labor Relations and Personnel and ultimately in this case, the decision of the National

Railroad Adjustment Board. It is the plaintiff's claim that the hearing officer was prejudiced and biased against him. This being so the entire proceedings became tainted and thus for a decision to be based upon this type of hearing is a denial to the Plaintiff of procedural due process. The District Court ignored the fact that Pfist was a hearing officer. Furtreh the District Court stated that the cases require that the Plaintiff show a denial of procedural due process on the part of the NRAB. It is our claim that by utilizing a transcript made by a prejudiced hearing officer the NRAB denied to the Plaintiff his right to procedural due process. The District Court has taken the additional position that since it "is precluded from reviewing the NRAB's determination that Plaintiff is not entitled to compensation * * * it would appear equally precluded from reviewing the NRAB's concomitant determination that plaintiff was not denied a fair hearing * * *". It is this position that is the heart of the dispute. To accept the District Court's position is to take from the Courts their right as well as to impede their duty to protect the constitutional rights of those who appear before administrative boards. The District Court seems to hold that it must be bound by the finding of the NRAB as to a constitutional issue. With this we disagree.

There can be no dispute with the claim that if a hearing officer is biased there is a clear violation of procedural due process. In *NRLB v. Phelps*, 136 F2d 562, 5th cir. (1943) the court stated at page 563:

> The Board does not indeed, it could not, contest the correctness of the principal respondents invoke, for a fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed if there is any dif-

ference the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. *Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partially appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.* (emphasis supplied)

There can be no doubt that this principal should be applied to matters before the National Railroad Adjustment Board. The Courts have uniformly held that they possess the power to consider the validity of the acts of the Board when a denial of procedure due process is shown. See *Barnett v. Penn. Reading Seashore Lines*, 245 F2d 579 3 Cir. (1957); *Ferro v. Railway Express Agency Inc.*, 296 F2d 847 2 Cir. (1961); *Rychlik v. Penn. R. R. Co.*, 229 F2d 171 2 Cir. (1956)

With this principal firmly established it follows that the Courts will examine the action of the Board if procedural due process has been violated at any step of the proceedings and it is unreasonable to restrict this examination to the acts of the Board only. While the District Court in the instant case has so restricted itself the weight of authority would appear to be contrary. In *Weaver v. Penn Railroad* U.S.D.C. N.Y. 141 F. Supp 214 (1956) Affirmed 240 F2d 350 the claim was made that the hearing officer was also the one who preferred the charges. Upon a hearing the Court found

that the Plaintiff's own testimony convicted him of the charge and as a result he suffered no prejudice. However, the Court did review the proceedings because the issue of procedural due process was raised. The same procedure was suggested in *D'Amico v. Penn. R. R. Co.* U.S.D.C.S.D. N.Y. 191 F. Supp 160 (1964). The Plaintiff sought an injunction to enjoin the Defendant from proceeding with a disciplinary trial upon charges alleged violation of Company rules. The Plaintiff conceded that in the event of an adverse ruling he could appeal to the National Railroad Adjustment Board. The Defendant concedes that it has refused to allow counsel of the Plaintiff's choosing to represent him. The Plaintiff claims that the designated hearing officer is hostile to him. The Court held that at this point it was without jurisdiction to act. However, certainly the court inferred that at a later point it might act.

Clearly then, the Plaintiff is entitled to a trial on the merits of his claim that procedural due process was denied to him. To conclude otherwise would be to transfer from the Federal Courts their right and duty to consider and to rule on Constitutional issues as here, to the National Railroad Adjustment Board. This we must not do.

CONCLUSION

The Writ should issue.

Respectfully submitted,

F. TIMOTHY MCNAMARA
75 Lafayette Street
Hartford, Connecticut

Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 111—September Term, 1964.
(Argued October 26, 1964 Decided November 24, 1964.)
Docket No. 28988

JAMES J. D'ELIA, JR.,

Appellant,

v.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD AND RICHARD JOYCE SMITH, WILLIAM J. KIRK, HARRY W. DORIGAN AS TRUSTEES OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD,

Appellees.

Before:

LUMBARD, *Chief Judge,*
HAYS and MARSHALL, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the District of Connecticut, William H. Timbers, *Judge*, 230 F. Supp. 912 (1964), granting defendants' motion for summary judgment in an action for review of an award of the National Railroad Adjustment Board.

Affirmed.

F. TIMOTHY MCNAMARA, Hartford, Conn., *for Appellant.*

THOMAS J. O'SULLIVAN, New Haven, Conn., *for Appellees.*

PER CURIAM:

D'Elia, an employee of defendant railroad, was suspended from his job for a short time on a charge of mis-

conduct. He claimed that the suspension was unjustified and sought to recover his wages for the period of suspension. His claim was submitted to the National Railroad Adjustment Board where, after the representatives of the parties had deadlocked, a referee decided in favor of the railroad. D'Elia then brought this action in the district court seeking a review of the determination of the National Railroad Adjustment Board. The district court granted defendants' motion for summary judgment and D'Elia appealed. We affirm the action of the district court.

The only claim which D'Elia presses here is that the Board failed to afford him due process of law when it used as a basis for its decision "a transcript made by a prejudiced hearing officer."

The initial hearing in D'Elia's case was held by a representative of the employer railroad. This is the procedure provided in the collective agreement between the railroad and D'Elia's union and it is the procedure contemplated by the Railway Labor Act. See Subsection First (i) of Section 3, 45 U.S.C. §153. Under the Act, D'Elia was entitled to a completely impartial hearing only when the case reached the referee designated to sit with the Board. As long as the final hearing officer was impartial the requirements of due process were satisfied.

The fact that the Board had before it the transcript of the proceedings before the employer's hearing officer does not in itself import any denial of due process, and D'Elia has failed to show any particulars in which the transcript presented his case unfairly or in which he was harmed by the Board's use of the transcript. In short, D'Elia's conclusory allegations as to a denial of due process are wholly insufficient to resist the defendants' motion for summary judgment.

Affirmed.

APPENDIX B

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is an action by an employee of defendant Railroad to set aside a determination of the National Railroad Adjustment Board (hereinafter NRAB) that plaintiff is not entitled to compensation from defendant for a period during which plaintiff was suspended from employment without pay. (Plaintiff has since been restored to employment.)

Jurisdiction of this Court is alleged to be pursuant to 28 U.S.C. §1337 and 45 U.S.C. §§151 et seq.

A. Plaintiff seeks a declaratory judgment pursuant to U.S.C. §1337:

(1) that this Court has the power to review a determination of the NRAB which does not contain a money award in favor of the petitioning employee, and to declare that determination incorrect on the evidence;

(2) that the NRAB's determination in the instant case is not supported by the evidence;

(3) that plaintiff was denied his federal constitutional right to a "fair hearing" at the stage of a preliminary Railroad hearing on certain charges against plaintiff, because the hearing officer, one Pfister, was prejudiced against plaintiff and incapable of conducting a fair hearing; and

(4) that plaintiff was deprived of his federal constitutional rights by the failure of plaintiff's union, not

a party to this action, to provide plaintiff with counsel at the hearing before the NRAB.

B. Plaintiff also seeks:

(1) damages in the amount of $3,000; or, in the alternative

(2) a hearing *ab initio* on the charges against him which resulted in his suspension.

Pursuant to Rule 56, Fed. R. Civ. P., defendant has moved for a summary judgment in its favor.

The essential facts are not in dispute.

January 20, 1960 a hearing on various charges against plaintiff was conducted by J. J. Pfister, an employee of defendant Railroad.

February 2, 1960 defendant's Mechanical Superintendent, R. H. Davis, advised plaintiff by letter that he was found guilty of the various charges and would be disciplined by dismissal from defendant's employ.

March 22, 1960, pursuant to negotiations between plaintiff's union and defendant, plaintiff was restored to defendant's employ with seniority and vacation rights unimpaired, but without pay for the period during which he was suspended.

June 17, 1963 the NRAB, to which the dispute over pay for the period of plaintiff's suspension was submitted when plaintiff's union and defendant were unable to agree, denied plaintiff's claim for compensation.

October 4, 1963 plaintiff filed the complaint in the instant action seeking relief as set forth above.

October 31, 1963 defendant filed the pending motion for summary judgment in its favor.

In the view the Court takes of this matter the resolution of two basic issues determines the disposition of this motion:

I. Whether the Court has the power to review a determination of the NRAB which does not contain a money award in favor of the petitioning employee; and

II. Whether plaintiff was denied any federal constitutional right by the NRAB.

I.

COURT'S POWER OF REVIEW

The Railway Labor Act[1] establishes a National Railroad Adjustment Board with jurisdiction to determine disputes between railway carriers and "carmen employees, *inter alia*.[2] Plaintiff was, at the time the dispute herein arose, a carman.

The act provides that:

> "the awards [of the Board] shall be final and binding upon both parties to the dispute, *except insofar as they shall contain a money award*." [Emphasis added][3]

In clarification, the Act further provides that if a money award *in favor* of a petitioner is made, the NRAB shall make an order directing the carrier to pay the award;[4] and if the carrier fails to comply with such order by paying the award,

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1 45 U.S.C. §§151-188.
2 45 U.S.C. §153 First (h).
3 45 U.S.C. §153 First (m).
4 45 U.S.C. §153 First (o).

the petitioner may institute a civil action in the District Court to enforce that award.[5]

Thus, it is clear that the Act's provision for finality of the NRAB's awards, and implicit concomitant preclusion of judicial review thereof, applies to all determinations of the NRAB which do *not* include a money award in favor of the petitioner. The award of the NRAB in the instant case falls in this latter category.

In *Union Pacific R. Co. v. Price*[6] the Supreme Court recently set forth a definitive interpretation of 45 U.S.C. §153 First (m). The Court said:

> "Congress has said in §3 First (m) of the Railway Labor Act [45 U.S.C. §153 First (m)] that the Adjustment Board's 'awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award.' Respondent does not argue that a 'money award' is anything other than an award directing the payment of money. Indeed, it would distort the English language to interpret that term as including a refusal to award a money payment. Thus, the plain language of §3 First (m), on its face, imports that Congress intended that the Board's disposition of a grievance should preclude a subsequent court action by the losing party . . . Our understanding of the statutory scheme and the legislative history . . . reinforces what the statutory language already makes clear, namely, that Congress barred the employee's subsequent resort to the common-law remedy after an adverse determination of his grievance by the Adjustment Board."[7]

---

5 45 U.S.C. §153 First (p).
6 360 U.S. 601 (1959).
7 *Id.* at 608; *accord*: *Barnett v. Pennslyvania-Reading-Seashore Lines*, 245 F. 2d 579 (3 Cir. 1957).

In *Price* the employee-petitioner had contended that:

> "[B]ecause an enforcement proceeding against a noncomplying carrier under §3 First (p) [45 U.S.C. §153 First (p)] affords the defeated carrier some opportunity to relitigate the issues decided by the Adjustment Board, unfairness results if §3 First (m) [45 U.S.C. §153 First (m)] is construed to deny the employee the right to maintain this common-law action."[8]

Indeed, plaintiff in the instant case in effect makes the same contention in arguing this Court should adopt the reasoning of the dissent in *Price*.

But as the Supreme Court responded in *Price*, so must this Court respond here:

> "The disparity in judicial review of Adjustment Board orders, if it can be said to be unfair at all, was explicitly created by Congress, and it is for Congress to say whether it ought to be removed."[9]

Even conceding, *arguendo, the* applicability of *Union Pacific R. Co. v. Price, supra,* in the *ordinary* case, plaintiff argues that when, as here, the allegations of an employee's complaint raise the issue of a denial of procedural due process of law, this Court must decided that issue.

To the extent this argument relates to plaintiff's allegation of a denial of a "fair hearing" at the preliminary Railroad hearing conducted by defendant's employee, Pfister, it has no foundation. (To the extent it relates to an alleged denial of constitutional rights by the NRAB itself, plaintiff is on sounder ground; this aspect of the case is discussed *infra* at part II of this decision.)

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8 *Id.* at 614.

9 *Id.* at 615.

The authorities upon which plaintiff relies for the proposition that an alleged denial of due process at the preliminary Railroad hearing bestows upon this Court the power to inquire into the merits of that allegation — once it has been decided adversely to plaintiff by the NRAB, as it has in this by the NRAB, the federal courts have jurisdiction to ascer- only that if a petitioner alleges a denial of due process of law by the NRAB, the federal courts have purisdiction to ascertain the validity of that allegation. In *Ferro v. Railway Express Agency, Inc.*,[10] for example, the only Second Circuit case in point, cited by plaintiff, petitioners had claimed that they should not be required to have their dispute resolved by the NRAB because *the Board* was likely to be prejudiced against them. The Court rejected this claim, saying:

> "[T]he courts are invested with sufficient appellate jurisdiction over the Board to protect appellants from a denial of due process."[11]

Other cases make clear that it is only a denial of due process by some conduct of the NRAB in the making of an award which invests the District Courts with jurisdiction to review that award, when they would not otherwise have the power to do so.[12]

It should be emphasized here that plaintiff's claim of prejudice on the part of Pfister — and a consequent unfairness in the preliminary Railroad hearing conducted by him — *was* made when the compensation dispute was submitted to the NRAB; and it was *rejected* by that Board. Accordingly, since this Court is precluded from reviewing the NRAB's determination that plaintiff is not entitled to com-

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10 296 F. 2d 847 (2 Cir. 1961).

11 *Id.* at 852-3.

12 See, *e.g.*, *Hornsby v. Dobard*, 291 F. 2d 483, 487 (5 Cir. 1961); *Barnett v. Pennsylvania-Reading-Seashore Lines*, *supra* note 7, at 581.

pensation for the period he was suspended from employment without pay, it would appear equally precluded from reviewing the NRAB's concomitant determination that plaintiff was not denied a fair hearing at the company level of inquiry into the charges, as conducted by Pfister. Only an alleged denial of due process by conduct of the NRAB itself would permit this Court to review that Board's award under the circumstances of this case.[13]

II.

ALLEGED DENIAL OF CONSTITUTIONAL RIGHTS BY NRAB

The only claimed denial of plaintiff's constitutional rights that can be even remotely connected to the determination by the NRAB is:

> "That the failure of the Union to provide counsel for D'Elia at the time of the hearing before the National Labor [sic: Railroad] Adjustment Board deprived him of effective representation before said board, and therefore, deprived him of his Constitutional rights."[14]

---

[13] It should not be overlooked that even if "unfairness" were found to have crept into the preliminary inquiry by Pfister, it may well be considered to have been eliminated from any influence in the case when the compensation dispute was later fully submitted to the NRAB by the parties. As the Board's award makes clear, the dispute was decided on the basis of facts largely admitted by plaintiff; and to the existence of *these* facts, any possible prejudice of Pfister, manifested in the conduct of a subsequent hearing on behalf of defendant, would have no relevance. In this same category would fall the unelaborated and unsubstantiated claim of plaintiff that Pfister did not have made an accurate stenographic record of the hearing before him, and the further claim that plaintiff was prejudiced by Pfister's refusal to allow one Flanagan to represent plaintiff at that preliminary Railroad hearing. (In fact, it appears plaintiff was represented at this hearing by Messrs. Taylor, Sullivan and Galligan — the last of the three being General Chairmen of plaintiff's local union.)

[14] Complaint, p. 4 (filed October 4, 1963).

This allegation fails in numerous respects to set forth a claimed denial of constitutional rights by the NRAB which is sufficient to give this Court jurisdiction to review the Board's award under the cases cited above.[15] Furthermore, the allegation is at odds with the record in this case.

In the first place plaintiff contends that it was *his union*, and not the NRAB, which failed to provide him with counsel at the Board hearing. On its face this claim could not be construed as asserting a deprivation *by the NRAB* of any right whatsoever.

But even if it were alleged that the NRAB itself prevented plaintiff from being represented by counsel before it, or failed to provide counsel when plaintiff was unable to do so, the denial of a constitutional right thereby would not clearly be set forth. Initially, there is no provision in the Railway Labor Act which affords plaintiff a right to representation by counsel at hearings before the NRAB. And neither plaintiff nor the Court can find authority for the proposition that it is a denial of a petitioner's constitutional rights to deprive him of counsel at a hearing of a dispute before the NRAB.

Finally, it is conceded that an oral hearing before the NRAB of the compensation dispute involved here was neither requested by plaintiff nor had. Rather, the dispute was presented to the Board solely on written "submissions" by the parties. Plaintiff's "submission" is signed:

> "H. J. Galligan, General Chairman
> System Federation No. 17 — AFL-CIO
> (Carmen)"

---

15 See *Ferro v. Railway Express Agency, Inc.*, *supra* note 10; *Hornsby v. Dobard*, *supra* note 12; *Barnett v. Pennsylvania-Reading-Seashore Lines*, *supra* note 7.

It would thus appear that plaintiff was, in fact, "represented" in the dispute (as presented to the NRAB in written form) by the General Chairman of plaintiff's local union.

The Court finds no basis to the claim that plaintiff's constitutional rights were infringed by the NRAB.

Defendant's motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P., is granted, there being no genuine issue as to any material fact in the case and defendant being entitled to judgment as a matter of law.

Dated at New Haven, Connecticut, this 23rd day of March, 1964.

WILLIAM H. TIMBERS

William H. Timbers
United States District Judge

JUDGMENT

This case came on to be heard by the Court on defendant's motion for summary judgment, and the Court, after due consideration, having filed its memorandum of decision, concluding that there is no genuine issue as to any material fact in the case and that the defendant is entitled to judgment as a matter of law, and granting defendant's motion for summary judgment, now, therefore,

It is ORDERED, ADJUDGED AND DECREED that the complaint in this action is dismissed on the merits and that defendant recover its costs of action.

Dated at New Haven, Connecticut this 7th day of April, 1964.

GILBERT C. EARL
Clerk of Court

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APR 8 1965
JOHN F. DAVIS, CLERK

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BRIEF OF THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD AND RICHARD JOYCE SMITH, WILLIAM J. KIRK, HARRY W. DORIGAN AS TRUSTEES OF THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THOMAS J. O'SULLIVAN,
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54 Meadow Street
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 338 F(2) 701. The opinion of the United States District Court for the District of Connecticut is reported in 230 F. Supp. 912.

ARGUMENT

I.

THE PETITION WAS NOT TIMELY FILED.

Judgment was entered in the Court of Appeals on November 24, 1964. By 28 U.S.C.A. Section 2101(c), petitioner had 90 days after the entry of judgment within which to apply for a writ of certiorari. The petition was filed on March 11, 1965. The days which elapsed are as follows:

November	6
December	31
January	31
February	28
March	11
Total	107

The petition, therefore, was not timely filed.

II.

THE PETITION DOES NOT CONCERN ANY IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner claims the hearing officer of the Railroad had bias and prejudice against him and the transcript of the hearing before this officer was used by the Adjustment Board. He claims, in brief, that he did not get a fair hearing before the Board and that he was thus denied due process.

The facts on the matter are set out in the Memorandum of Decision of the District Court. It pointed out (Appendix to Petition for Writ of Certiorari, p. 9a) "As the Board's award makes clear, the dispute was decided on the basis of facts largely admitted by plaintiff; and to the existence of *these* facts,

any possible prejudice of Pfister, manifested in the conduct of a subsequent hearing on behalf of defendant, would have no relevance."

The Circuit Court also said (Appendix, p. 2a) ". . . D'Elia has failed to show any particulars in which the transcript presented his case unfairly or in which he was harmed by the Board's use of the transcript."

Thus this case involves only a claim by petitioner that he was denied due process without any showing (in the complaint or by affidavit to the courts below) how he, in fact, was denied due process. This, certainly, is not a matter involving a question of federal law, let alone such an important question of federal law as to require that a writ of certiorari be granted.

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

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By THOMAS J. O'SULLIVAN,
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